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NAGARAJA PONUSAMY

v.

MENTERI DALAM NEGERI, MALAYSIA & ORS

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FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
GOPAL SRI RAM FCJ
MOHD GHAZALI YUSOFF FCJ
[CRIMINAL APPEAL NO: 05-128-2009(B)]

C

22 JANUARY 2010

PREVENTIVE DETENTION: *Detention - Legality of detention - Appellant's request for adjournment to engage counsel through interpreter not put across to advisory board - Absence of cogent affidavit evidence on*

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part of respondents - Whether appellant prejudiced - Whether habeas corpus must issue - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)

The appellant was detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The appellant made representations to the Advisory Board. At the hearing before the Advisory Board, a detective was assigned to act as an interpreter as the appellant wished to speak in Tamil. It was the appellant's evidence that he had requested for an adjournment through the interpreter in order to engage counsel but that request was never put across to the Advisory Board. It was also the appellant's evidence that he had been asked to leave the room and he was unaware of what transpired thereafter. The appellant later learnt that the Advisory Board had made its recommendations despite his request for adjournment.

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Held (allowing the appeal)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

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(1) Although the interpreter's affidavit was filed on the respondent's behalf, nowhere therein were the specific allegations made by the appellant dealt with. All that was relied upon by the respondents in that behalf was the affidavit of the secretary of the Advisory Board in which he stated, based on the notes of proceedings, that if a request for an adjournment had been requested that would have been reflected in the notes. That was a *non sequitur* as the secretary did not speak or understand Tamil and was in no position to say what transpired between

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the interpreter and the appellant. It would not have taken much for learned Federal Counsel in charge of the matter to have filed a proper affidavit or to have delivered a further affidavit dealing with each of the appellant's allegations. In the circumstances, the court adopted the following test well-settled by a legion of authorities – where the deponent to an affidavit makes a positive assertion, which is not inherently incredible or inherently improbable, and his opponent in his affidavit does not credibly deny that allegation, a court should accept the former assertion as standing unrebutted. (paras 2 & 3)

(2) Accepting the appellant's unchallenged evidence that his request for an adjournment had not been put across by the interpreter to the Advisory Board, that constituted a serious departure from the basic concepts of fair procedure as a consequence of which the appellant suffered prejudice. It also went to the legality of his detention. Accordingly, *habeas corpus* must issue and the appellant was entitled to be released forthwith. (para 4)

(3) The liberty of an individual must override any points of mere procedure. As such, it did not matter that the appellant did not raise the points he did in this appeal when presenting his case to the High Court or that his petition of appeal did not set out in clear terms the grounds of challenge raised before this court. At the end of the day, the only question before this court was whether a detenu's detention was lawful and upon that question there could be no compromise. (para 5)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah ditahan di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 dan telah membuat representasi ke Lembaga Rayuan. Di pendengaran di hadapan lembaga, perayu meminta untuk bercakap dalam bahasa Tamil dan berikutnya seorang detektif telah diberi tanggungjawab untuk menjadi jurubahasa beliau. Menjadi hujah perayu bahawa beliau telah memohon penangguhan melalui jurubahasa dengan tujuan untuk mendapatkan khidmat peguam, tetapi permohonannya itu telah tidak disampaikan kepada Lembaga Rayuan oleh jurubahasa. Perayu selanjutnya memberi keterangan bahawa beliau telah diminta untuk meninggalkan bilik perbicaraan, berakibat beliau tidak mengetahui apa yang berlaku di situ kemudiannya. Perayu mendapati bahawa, walaupun beliau telah memohon penangguhan, Lembaga Rayuan masih juga membuat syor-syornya.

A **Diputuskan (membenarkan rayuan)**
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Walaupun afidavit jurubahasa telah difailkan bagi pihak
B responden, tiada apapun di situ yang menjawab dakwaan-dakwaan khusus yang dibuat oleh perayu. Bagi tujuan ini, responden hanya bergantung kepada afidavit setiausaha Lembaga di mana pihak terkemudian tersebut berkata bahawa, berdasarkan nota-nota prosiding, jika suatu permohonan untuk penangguhan
C sememangnya dibuat, maka ia seharusnya tercermin di dalam nota-nota. Itu adalah suatu non sequitur kerana setiausaha tidak bercakap atau memahami bahasa Tamil dan tidak berada dalam kedudukan untuk menerangkan apa yang berlaku di antara jurubahasa dan perayu. Bukanlah sesuatu yang begitu sukar
D untuk yang arif Peguam Persekutuan yang mengendali kes untuk memfailkan afidavit yang teratur atau mengemukakan afidavit lanjutan bagi menangani setiap dakwaan perayu. Dalam halkeadaan yang wujud, mahkamah memakai ujian berikut yang sudah pun diterimapakai oleh banyak autoriti-autoriti, iaitu – di
E mana seorang deponen afidavit membuat suatu pengataan asertif yang bukan sesuatu yang jelas tidak boleh dipercayai atau mustahil, dan lawan beliau di dalam afidavitnya pula tidak menyangkal dakwaan tersebut secara yang meyakinkan, maka mahkamah harus menerima pengataan yang terdahulu tersebut
F sebagai masih berdiri teguh dan tidak disangkal.

(2) Dengan menerima keterangan tidak disangkal perayu bahawa permohonan beliau untuk penangguhan telah tidak disampaikan oleh jurubahasa kepada Lembaga, maka suatu penyimpangan
G serius terhadap konsep asas keadilan telah berlaku yang menyebabkan prejudis kepada perayu. Sekaligus ia juga menjejaskan kesahan penahanan perayu. Oleh itu, *habeas corpus* mesti dikeluarkan dan perayu berhak untuk dibebaskan dengan serta merta.

H **(3)** Kebebasan seseorang individu harus mengatasi apa jua hujah berkaitan prosedur. Oleh itu, adalah tidak menjadi hal bahawa perayu telah gagal membangkitkan poin-poin yang dibangkitkan di rayuan ini semasa mengemukakan kesnya di Mahkamah Tinggi atau bahawa petisyen rayuan beliau tidak menyenaraikan
I dengan jelas alasan-alasan pencabarannya di mahkamah ini. Pada akhirnya, soalan tunggal yang berbangkit di mahkamah ini hanyalah sama ada penahanan seseorang detenu itu sah dan ini adalah soalan yang tidak boleh dikompromikan lagi.

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)

For the appellant - P Visnuvarman; M/s Alvinthiren & Partners
For the respondents - Amir Nasruddin; Legal Advisor

[Appeal from High Court, Shah Alam; Criminal Appeal No: MT5-44-73-2009]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram FCJ:

[1] This is yet another case in which we issued *habeas corpus* and set the detainee at liberty forthwith solely because of the absence of cogent affidavit evidence on the part of the respondents to this appeal. As will become apparent later in this judgment, this is the result of indifference on the part of the Federal Counsel in the settling of affidavits.

[2] The appellant was detained pursuant to a detention order issued by the first respondent under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance"). There is some dispute about the date of the order but nothing turns upon it for the purposes of the present appeal. We therefore accept that the order was dated 5 March 2009. The appellant made representations to the Advisory Board. At the hearing before the board on 6 May 2009 (there having been earlier hearings that had been adjourned at the appellant's request) one Detective Sergeant Antonidas Savrimuthu had been assigned to act as interpreter as the appellant wished to speak in Tamil. It is the appellant's evidence that he had requested for an adjournment through the interpreter in order to engage counsel but that the request was never put across to the board by the latter. It is also the appellant's evidence that he had been asked to leave the room so that he was unaware of what transpired thereafter. The appellant later learned that the board had made its recommendations despite his request for an adjournment. Although the interpreter's affidavit was filed on the respondents' behalf, nowhere in it are the specific allegations made by the appellant traversed or dealt with. All that was relied upon by the respondents in this behalf is the affidavit of

A the secretary of the board in which he states, based on the notes of proceedings, that if a request for an adjournment had been requested this would have been reflected in the notes. That, of course, is a *non sequitur* as the secretary does not speak or understand Tamil and is in no position to say what transpired
B between the interpreter and the appellant. Now, it would not have taken much for learned federal counsel in charge of the matter to have filed a proper affidavit or to have delivered a further affidavit dealing with each of the appellant's allegations.

C **[3]** In the circumstances adumbrated, what approach is the court to adopt? The answer to this question is well settled by a legion of authorities we find unnecessary to cite. It is this. Where the deponent to an affidavit makes a positive assertion, which is not inherently incredible or inherently improbable, and his opponent in
D his affidavit does not credibly deny that allegation, a court should accept the former assertion as standing unrebutted. Now apply that test here.

[4] Accepting the appellant's unchallenged evidence that his
E request for an adjournment had not been put across by the interpreter to the board, this constitutes a serious departure from basic concepts of fair procedure in consequence of which the appellant suffered prejudice. And it goes to the legality of his detention. Accordingly, *habeas corpus* must issue and the appellant
F is entitled to be released forthwith.

[5] There is one further point of importance that must be made. It may be true that the appellant did not raise the points he did in this appeal when presenting his case to the High Court. It may also be true that his petition of appeal does not set out in clear terms
G the ground of challenge raised before us. In our considered judgment all this matters not a jot as the case concerns the liberty of an individual which must override any points of mere procedure. At the end of the day, the only question before this court is whether a detenu's detention is lawful and upon that question there
H can be no compromise.

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